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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 518

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend,

Petitioner,

—v.—

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

PETITION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE IOWA CIVIL LIBERTIES UNION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA, WITH THE PROPOSED BRIEF ATTACHED

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On the brief.

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IN THE

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

The American Civil Liberties Union moves for leave to file a brief *amici curiae* in this case. The consent of the attorney for the appellant has been obtained. The consent of the attorney for the appellees was refused. Both letters are submitted herewith.

The American Civil Liberties Union and its affiliate the Iowa Civil Liberties Union are non-profit membership organizations dedicated to the preservation of the rights guaranteed by the Bill of Rights. They consider the determination by the Iowa Supreme Court in this case to be in derogation of the constitutional rights of the father and child involved in this proceeding and a usurpation by the State of the parental rights and obligations of one who

concededly is a fit and proper parent. They also seek leave to file a brief in support of the petition because they believe the Supreme Court of Iowa, in reaching its determination, violated the First and Fourteenth Amendment commandments that church and state shall remain separate and that no persons shall be deprived of religious or political freedom.

Respectfully submitted,

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AND THE IOWA CIVIL LIBERTIES UNION *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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BRIEF OF *AMICUS CURIAE*

Interest of *Amicus*

The American Civil Liberties Union and its affiliate, the Iowa Civil Liberties Union are non-profit membership organizations dedicated to the preservation of the rights guaranteed by the Bill of Rights. They sought the parties' consent to the filing of this brief because they consider the determination by the Iowa Supreme Court in this case to be in derogation of the constitutional rights of the father and child involved in this proceeding and a usurpa-

tion by the State of the parental rights and obligations of one who concededly is a fit and proper parent. They also file this brief in support of the Petition because they believe the Supreme Court of Iowa, in reaching its determination violated the First and Fourteenth Amendment commandments that church and state shall remain separate, and that no persons shall be deprived of religious or political freedom.

Statement

The subject matter of this proceeding is the right of Harold Painter to have custody of his seven year old son Mark. The Court below awarded custody to the child's maternal grandparents, Margaret and Dwight Bannister.

Harold Painter, now 35 years of age, is a devoted family man (R. 39, 42, 43, 48, 65) (see also findings of the trial court, Petitioner's brief, Appendix C, pp. 15a, 16a). The warm, close-knit family relationship between Harold Painter, his first wife, Jeanne, and their children Mark and Janet came to a tragic end with the death of his wife in an automobile accident (R. 38, 45, 48, 52). (Janet was also killed in the accident.) Except for a short period, when he tried to earn a living as a free-lance writer (R. 5), Painter's income as a newspaper writer or editor ranged between $100.00 a week and $200.00 a week (R. 35, 38, 43, 62).

After his wife's death Painter tried to keep Mark with him, but found that his need to earn a living interfered with what he considered to be proper care for Mark (R. 59-61, 63-66). At his request, Mark's maternal grandparents took Mark to live with them until Painter's circumstances made it possible for him to have Mark back (R. 67).

A year after Mark went to live with his grandparents, Painter became engaged to be married, and asked for Mark's return, which was refused (R. 77, 78). After Painter and his second wife, Marilyn, a college graduate who had considerable experience with children were married and had bought a home for Mark and themselves, they again tried to have Mark returned to them (R. 150-152, District Court's findings of fact, Petitioner's brief, Appendix C, pp. 14a-21a). When their requests were refused this suit was commenced (R. 96-102, 104, 164, 165).

The District Court of Story County, Iowa, found Harold Painter to be a fit parent who had not abandoned his child and awarded custody of the child to him (see District Court's opinion, Petitioner's brief, Appendix C, pp. 19a-20a). On appeal taken by Mark's grandparents the Supreme Court of Iowa also found Harold Painter to be a fit parent who had not abandoned his child (see Court's opinion, Petitioner's brief, Appendix B, p. 5a), but awarded custody to the grandparents because, it decided, that was in the best interests of the child (see Court's opinion, Petitioner's brief, Appendix B, p. 9a).

REASONS FOR GRANTING WRIT

POINT I

The right of a fit parent, who has not abandoned his child, to live with and to raise his child and the concomitant rights of the child, are protected by the Fourteenth Amendment and may not be abridged by a State unless the child's welfare would be put in jeopardy by the exercise of those rights. Those rights may not be violated because a court believes other persons are better equipped to act in the role of parent.

Although the District Court of Story County, Iowa awarded custody of Mark to his father, the Supreme Court of Iowa reversed the lower court and awarded custody to the grandparents on the totally invalid assumption that the court had the right and obligation, purportedly in the child's best interests, to determine whether someone other than the child's natural parent could provide him with a superior environment.

Once it was determined that Harold Painter was a fit parent who had not abandoned his child, and that there was no reason to believe that his custody and control would result in injury to the child, the Court was not justified in interfering with his right to raise the child. The right of a parent to bring up his child is a constitutionally protected right that this Court has long recognized. In *Prince* v. *Commonwealth of Massachusetts,* 321 U.S. 158, 166 (1944), this Court said:

> "... It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose pri-

> mary function and freedom include preparation for obligations *the state can neither supply nor hinder.* Pierce v. Society of Sisters . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." (Emphasis added.)

In *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), the Court held legislation to be unconstitutional because it "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of children" and stated further (at page 535): "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children. . . .". As Jessamyn West wrote of the opinion and decision of the Iowa Supreme Court in this case "The only place outside of *Alice in Wonderland* or Franz Kafka that such reasoning seemed possible was one of the totalitarian countries where the state disregarding the rights of parents, can determine the mold in which the child is to be shaped." The Ladies Home Journal, May, 1966, p. 88.

In *Meyer* v. *Nebraska,* 262 U.S. 390 (1923), this Court, in striking down a statute that made it illegal to teach a foreign language before a child had completed the eighth grade stated at page 399:

> "The problem for our determination is whether the statute, as construed and applied, unreasonably infringes the liberty guaranteed to the plaintiff in error (the child's father) by the 14th Amendment. 'No state . . . shall deprive any person of life, liberty, or property without due process of law.'

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, *establish a home and bring up children,* to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (Emphasis and matter in parentheses added.)

In the instant case, the Iowa Supreme Court determined that the care and upbringing of the child should be wrested from his father, and vested in his grandparents because, in the Court's opinion, the grandparents, in their sixties, offered a more stable existence. Life with the Petitioner's father, the Court believed, " . . . would be unstable, unconventional, arty, Bohemian, and probably intellectually stimulating". Court's opinion, Petitioner's brief, Appendix B, p. 8a.

The role of the court as protector of children against their natural parents is limited to cases involving mistreatment or mishandling by the parent that will in some way endanger the child's health or welfare. In the instant case, the court's right to interfere with the father's custody of his child ended when it found that the father was fit and had not forfeited his right to care for his child by abandoning or failing properly to care for him. As the Court of Appeals of New York said in *People ex rel. Kropp* v. *Shepsky,* 305 N.Y. 465, 469, 113 N.E.2d 801, 803 (1953):

> "No Court can for any but the gravest reasons, transfer a child from its natural parent to any other person . . ."

See also *People ex rel. Portnoy* v. *Strasser,* 303 N.Y. 539, 104 N.E.2d 896 (1952), and *Stubbs* v. *Hammond,* 135 N.W.2d 540 (Iowa, 1965). An appellate court's supposition that a child's welfare will be advanced by turning him over to someone wealthier and more conservative than his natural parent is not a sufficiently grave reason for depriving the parent of custody. The general maxim that a child is a ward of the court and that the court should act in what it deems to be in the child's best interests may not be stretched to justify the court's assuming the role of a parent's surrogate, when the parent is able and wishes to take care of his child himself. Certainly those maxims cannot be distorted and misapplied to permit the court to take a child from his natural, fit parent where there is no reason to believe that the parent will expose the child to physical danger or will refuse to educate the child or will in any way mistreat him. *Prince* v. *Commonwealth of Massachusetts,* 321 U.S. 158, 167 (1944). In *People ex rel. Anonymous* v. *Louise Wise Services,* 21 A.D.2d 327, 250 N.Y.S.2d 507 (1964), the court, in awarding the child to its parents, despite the fact that the adoptive parents could have furnished a superior environment, stated at 21 A.D.2d 329, 250 N.Y.S.2d 510:

> "But neither the agency nor the courts should indulge in omnipotent parent selection except in the cases where the unfitness of the parents is *unequivocal* or the welfare of the child *unequivocally* mandates otherwise." (Emphasis ours.)

We doubt the competence of a trial court to make such a selection. "It would seem inherent in the concept of a fit parent that such a parent would be at least as responsive as the trial court and very probably more so, to the best interests of the child." Traynor, *J.*, concurring in *In re Guardianship of Smith,* 42 Cal.2d 91, 95, 265 P.2d 888, 891 (1954).

An appellate court would seem even less qualified than a trial court, to make a wise decision with respect to a child's best interests.

In *In re Kailer;* 123 Kan. 229, 231, 225 Pac. 41, 42 (1927), the Kansas Supreme Court said:

> "Under the law of the land, the welfare and best interests of children are primarily the concern of their parents, and it is only when parents are unfit to have the custody, rearing, and education of children that the state as *parens patriae,* with its courts and judges, steps in to find fitting custodians *in loco parentium.*"
>
> "And it never becomes a judicial question as to what is for the welfare and best interests of children until the exceptional case arises where the parents are dead, or where they are unfit to be intrusted with the custody and rearing of their children and have forfeited this right because of breach of parental duty, or where the right has been prejudiced by the discord of the parents themselves. . . . And no court should construe its intrusive jurisdiction as extending to cases where parents have done nothing offensive to law, morals, or good conduct, which would forfeit their paramount natural right of parenthood, which is to have custody of their own children."

POINT II

Consideration of the father's religious beliefs as a relevant, if not the controlling factor in determining his right to custody of his child, is a violation of the First and Fourteenth Amendments to the Constitution in that such consideration promotes the establishment of a religion and abridges the religious liberty of the father.

In making its decision, the court below examined several of Harold Painter's "philosophies", which it felt were "important as they relate to [the child] and his particular needs". "Mr. Painter", the Court said, "is either an agnostic or atheist and has no concern for formal religious training. He has read a lot of Zen Buddhism and 'has been very much influenced by it'. Mrs. Painter is Roman Catholic. They plan to send Mark to a Congregational Church near the Catholic Church, on an irregular schedule." Opinion of the Iowa Supreme Court, Petitioner's brief, Appendix B, p. 7a.

In deciding whether the child was to be reared by his father or his maternal grandparents, the Iowa Supreme Court admittedly was influenced by Harold Painter's religious background and beliefs. The court thus made it plain that a father who wishes to keep or regain the custody of his child, should observe certain forms of religion approved by the court or have his personal religious beliefs, atheism or agnosticism, count against him.

The Constitution forbids any coercion to follow a creed or to practice a form of worship, even by indirection.

> ". . . [N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or

other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 642 (1943).

And in *Smith* v. *Smith,* 90 Ariz. 190, 193, 367 P.2d 230, 233 (1961), the Court said:

"Since the decision in West Virginia State Board of Education v. Barnette . . . it has been the uniform judgment of every court reaching the question that if a teaching does not conflict with the fundamental law of the land a parent may not be deprived of the custody of a child because of the court's disagreement with such parent as to religious beliefs . . . a parent who teaches a child doctrines at variance with majority views does not give rise to grounds sufficient to support a change of custody."

POINT III

Consideration of the father's political attitude as a relevant, if not a controlling, factor in determining his right to custody of his child abridges political rights guaranteed by the First and Fourteenth Amendments.

Any state action that penalizes an individual for his political views or attitudes clearly infringes the constitutionally guaranteed right of freedom of belief and expression. *American Communications Assn., C.I.O.* v. *Douds*, 339 U.S. 382, 393 (1950).

The court below made the following comment on Harold Painter's views:

> "He is a political liberal and got into difficulty in a job at the University of Washington for his support of the activities of the American Civil Liberties Union in the university news bulletin." Opinion of the Iowa Supreme Court, Petitioner's brief, Appendix B, at p. 7a.

Clearly, the Court considered Harold Painter's political (in the Court's view) liberalism in determining whether he had a right to bring up his child and in taking that into consideration abridged his constitutional rights.

CONCLUSION

The writ of certiorari should be granted. The several important questions arising under the United States Constitution outlined in this brief have not heretofore been considered by this Court and should be determined.

Respectfully submitted,

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